S.B. Civil Misc. Appeal No.114/2005

Raj Kumar & Anr. vs. State Bank of Bikaner & Jaipur.

Date : 13.9.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. RK Singhal, for the appellants.
Mr. RK Thanvi, for the respondent.

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Heard learned counsel for the parties.

The appellants are aggrieved against the order dated 18.12.2004 by which the appellant's application under Order 9 Rule 13 CPC was dismissed by the trial court.

Brief facts of the case are that the plaintiff filed a suit before the trial court in which summons were issued to the defendants. The first summon sent to the defendants came with a report of the process server that the summons were offered to the defendant no.1 both for the defendant no.1 himself and of defendant no.2, who is wife of the defendant no.1. The defendant no.1 refused to accept the summons and, therefore, the same were affixed. However, the process server reported that nobody agreed to attest the service report, therefore, he returned the summon without the endorsement of any witness for affixture of summon of the defendants.

In the trial court, the defendants submitted

application for setting aside the ex-parte decree which was passed on 18.12.2003 with a plea that the defendants came to know about the decree when they inspected the file on 31.1.2004 after the receipt of the letter from the bank dated 19.1.2004. The trial court dismissed the application of the defendants on the ground that the application has been filed after delay and the service is sufficient.

It appears from the report made by the process server himself (copy of summons with report shown by learned counsel for the appellant) that the process server only reported that the summons were offered to the defendant no.1 and he refused to accept the summons of the defendant no.1 and of his wife – defendant no.2. He states that nobody agreed to sign the report of affixture of summons. No efforts have been made thereafter of offering of summon to the defendants in the presence of the witnesses. No reason has been given by the process server that when nobody agreed to witness the event, why he did not made any efforts of serving the defendants.

In view of the above and in view of the fact that the personal service has not been effected, the trial court should have treated the date of knowledge of the petitioners to be starting point of limitation and from that, application is within limitation.

Learned counsel for the respondent submits that the objection of the defendants is about irregularity in

service of summon and, therefore, it is no ground for setting aside of the ex-parte decree.

The question here in this case is whether there was service at all or not ? If the service is not, then it is not a case of irregularity in service. This Court had no hesitation in holding that the service in the manner in which it is alleged to have been effected is no service in the eye of law, therefore, I do not find any force in the contention of learned counsel for the respondents.

Looking to the facts of the case and making no efforts by the Court to serve the summons upon the defendants, this Court is of the opinion that the trial court committed error of fact as well as error of law in holding the service as sufficient and holding the starting point of limitation from the date of decree, therefore, the order dated 18.12.2004 deserves to be set aside, hence, set aside. The application filed by the petitioners under Order 9 Rule 13 CPC is allowed and the decree dated 18.10.2003 is set aside and the consequence of preliminary decree shall follow. Both the parties are directed to appear before the trial court on 18.10.2005.

The appeal is accordingly allowed.

(PRAKASH TATIA), J.

S.Phophaliya